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No. _____

In The

Supreme Court of the United States

October Term, 1993

CITY OF SAN DIEGO,

Petitioner,

v.

PHILIP K. PAULSON, HOWARD T. KREISNER & SOCIETY OF SEPARATIONISTS, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA ON BEHALF OF PETITIONER THE CITY OF SAN DIEGO

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QUESTIONS PRESENTED

I. Should federal courts abstain from determining unsettled questions of state constitutional law?

II. Is a passive historical structure with religious connotations violative of a state constitutional clause that has not been definitively interpreted by state courts?

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I

INTRODUCTION

Amicus Curiae State of California ("California") submits that the ruling of the Court of Appeals that the Mt. Soledad Memorial Cross violates the California Constitution should be reversed on two grounds. First, the lower court should have abstained because at issue is an unsettled provision of the California Constitution and the State should have the opportunity to interpret its own constitution. Second, the Court of Appeals erred in rejecting the importance of the public policy of historic preservation that both the State of California and The City of San Diego have implemented. If the Ninth Circuit order stands, numerous historic sites throughout the state will be threatened with destruction.

II

INTEREST OF AMICUS CURIAE

The State of California has a particularly strong interest in this case. First, it is the State's constitution that is at issue. As the Chief Justice of the California Supreme Court has emphasized, state courts are the final arbiters of the provisions of state constitutions. By construing an unsettled provision of the State constitution, without allowing the State courts to rule, the appellate court has deprived California of the vital power over its own constitution.

California has an important public policy to foster historic preservation, including public ownership of historic sites, regardless of the popularity each artifact may

currently possess. It cannot be emphasized too strongly that California has a strong interest in avoiding a judicial determination that would countermand this policy and impede protection of important State historical sites.

III

ARGUMENT

A. California Courts Should Have the Opportunity to Interpret Unsettled Clauses of its Own Constitution

As discussed in Petitioner City of San Diego's Petition for Certiorari, the interpretation of the California Constitution's "no preference" clause is unsettled. California should have the first opportunity to interpret the language of that clause in relation to this case. The Court of Appeals should have abstained. California joins in Petitioner's argument and presents its own perspective.

1. The "No Preference" Clause is Unsettled

The only two current decisions by the California Supreme Court dealing with the "no preference" clause demonstrate no unanimity as to exactly what constitutes a violation of that section. In *Fox v. City of Los Angeles*, 22 Cal. 3d 792 (1978) the court issued a seriously divided opinion. Not only did Justices Richardson and Clark dissent on the basis that the illumination of a cross from a city building did not violate the state and federal constitutions, but each of the three opinions expressed a different view as to whether the California Constitution compelled the majority view that the display was constitutionally prohibited. *Id.*, at 822-25, dissent of Clark, J.; at

813-22, dissent of Richardson, J.; at 799-813, concurring opn. of Bird, C.J. While the 4-justice plurality opinion appears to rely exclusively on the "no preference" provision of article I, section 4, of the California Constitution, Chief Justice Bird relies on both Constitutions without indicating whether the state constitution is broader or more protective that the federal provision. Id., at 806-07. Justice Clark, on the other hand, correctly noted that the 4-justice plurality opinion utterly fails to explain the state constitutional violation in the illumination on the city building. Id., at 824-25. No uniform view as the meaning and applicability of the state constitutional "no preference" clause appears in Fox.

In *Sands v. Morongo Unified School District*, 53 Cal. 3d 863 (1991), *cert. denied* 112 S. Ct. 3026 (1992), another confusing opinion, the court expressed divergent views on the relevancy of the federal and state constitutions to this issue.

> As a result of the various opinions filed in this case, three justices have concluded that the practice violates our state constitution, two have concluded that it does not, and two (myself included) have declined to reach any state constitutional issues. Therefore, our judgment does not rest on the state constitution; any resolution of the state constitutional issues will necessarily await another day.

Id. at 902 (Lucas, C.J., concurring).

Hence, the Ninth Circuit's ruling on this case directly contradicts one of the basic tenets of *Pullman* abstention: that an issue of unsettled state law should be decided by

the state before the federal courts become involved. *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 499 (1940).

The Court of Appeals erred in assuming that *Pullman* abstention was not warranted on the ground, as it noted, "[h]ere, we have interpretive caselaw." *Ellis v. City of La Mesa*, 990 F.2d 1518, 1522 (9th Cir. 1993). As demonstrated, state court interpretive caselaw concerning the "no preference" provision of the state constitution is unsettled as any one clause could be. As this case involves not the active and seasonal illumination of windows in a city building or the giving of a prayer in a school ceremony, but the passive presence of a structure which has some religious (as well as other) meaning, the legal significance of this object under *state* constitutional law is not something "that a federal court [can] predict with any confidence . . . " *Pearl Inv. Co. v. City and County of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985).

Additionally, the Court of Appeals announced it perceived no "special circumstances" so as to warrant *Pullman* abstention. *Ellis*, at 1522. These circumstances apply where the state law is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question. *Kusper v. Pontikes*, 414 U.S. 51, 54 (1973). Certainly, here, the state judiciary is capable of reaching a conclusion or settling the relevant principles that would apply to these facts, without reaching the federal constitutional questions. Given these circumstances, it is not appropriate for the federal court to decide the unsettled questions of state

constitutional law, when that is precisely what can and should be done by the state court.

2. California Courts Should be Permitted to Interpret the California Constitution

As noted in the Petition for Certiorari, the case law is clear that where state law is uncertain, federal courts should abstain and allow the state courts to interpret the language in question before they rule on the issue. *Askew v. Hargrave*, 401 U.S. 476, 478 (1971). "The Pullman doctrine was based on the 'avoidance of needless friction between federal pronouncements and state policies. The instant case is the classic case in that tradition, for here the nub of the whole controversy may be the state constitution." *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970) (citations omitted). California respectfully submits that the federal district court should have abstained and allowed the state courts the first opportunity to interpret this important constitutional provision.

B. The Ninth Circuit's ruling, if upheld, threatens the very existence of historical treasures which it is the policy of California to protect.

The California legislature has expressly declared the importance of California's public policy of historic preservation. "The Legislature . . . finds and declares that . . . [c]ities, counties, and districts must exercise constant vigilance to see that the . . . historical resources they now have are not lost to other uses." Cal. Pub. Res. Code 5096.113(h). Such preservation includes public ownership of historic sites as well. "It is in the public interest

for the state to acquire, develop, and restore areas for . . . [historic] preservation and to aid local governments of the state in acquiring . . . such areas." Id.

The fact that the City's Historical Site Board has designated the landmark as an historical site, adds weight to Petitioner's argument. "We decline to second guess the agency's expert determinations . . . since there is adequate support for those conclusions in the record." *Association of Pacific Fisheries v. Environmental Protection Agency*, 615 F.2d 794 (9th Cir. 1980).

If the ruling of the Ninth Circuit is allowed to stand, not only this landmark, but other similar historic sites on public land throughout the State are in jeopardy. Numerous historic religious sites on public property across the state are threatened by the appellate court's ruling, including:

- The first Jewish synagogue in San Diego
- The Fr. Junipero Serra Cross site
- A Chinese temple
- A Methodist church
- The Los Flores Chapel
- The Yosemite Valley Chapel
- The Estrella Adobe Church
- The Mormon Trail Monument

As Petitioner argued in its Petition for Certiorari, a governmental entity's actions to preserve historic sites, including those similar to the Mt. Soledad Cross, cannot reasonably be said to show preference for or to establish

any religion. California emphatically joins in Petitioner's argument.

IV

CONCLUSION

California respectfully and urgently requests that this Court grant certiorari and overturn the Ninth Circuit's erroneous ruling, or, in the alternative, remand this case with directions that it should be heard in state court.

DATED: June 14, 1994

Respectfully submitted,

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